UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL #18 – WISCONSIN AFL-CIO

Case 30-CB-075815

and

EVERBRITE, LLC

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO THE UNION'S EXCEPTIONS

Submitted by:

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Andrew S. Gollin, Counsel for the Acting General Counsel, respectfully submits this Answering Brief to Exceptions filed by Sheet Metal Workers International Association Local #18, AFL-CIO ("Union")

I. INTRODUCTION[1]

On July 27, 2012, the Honorable Associate Chief Administrative Law Judge Arthur Amchan ("ALJ") issued his Decision correctly finding that the Union violated Section 8(b)(3) of the Act by refusing to bargain with Everbrite, LLC ("Company") over a successor collective-bargaining agreement. On August 24, 2012, the Union filed Exceptions and a Memorandum of Law in Support. For the reasons stated below, the Board should affirm the ALJ's Decision.

The Union represents a unit of approximately 30 employees working for the Company at its South Milwaukee, Wisconsin plant. The parties' most recent collective-bargaining agreement is dated March 1, 2009 through February 29, 2012. Article XXXII, Section 2 states the terms of the agreement "shall continue in effect on a year to year basis, unless either party notifies the other of its intent to modify, or terminate this Agreement, and does so in writing at least sixty (60) days prior to the expiration date." The ALJ correctly found that the Company provided the Union with the requisite written notice of its intent to terminate or modify the parties' agreement by December 30, 2011.[2]

The Company provided the requisite notice though various communications, including, but not limited to: (a) the emails exchanged between July 1 and December 15; (b) the Company's October 25 and December 21 comprehensive proposals for a "new agreement;" and (c) the

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[1] General Counsel's Exhibits will be referred to as (G.C. Exh. __); Union's Exhibits will be referred to as (U Exh. __); and the Company's Exhibits will be referred to as (ER. Exh. __); and Transcript citations will be referred to by page number and line number as (Tr. __:__), unless the Transcript cite covers multiple pages. The ALJ's decision will be referred to as (ALJD ___). Citations to the Union's Brief in Support will be referred to as (U Brf. ____).

[2] Unless otherwise stated, all dates are in 2011.

December 21 letter from the Federal Meditation and Conciliation Service (FMCS) to the Company and the Union, after the Company electronically filed its FMCS Form 7, identifying the mediator assigned to assist the parties in their "upcoming negotiations."

Even if this were not true, the Union waived its right to notice when it commenced bargaining with the Company over a successor agreement prior to the 60-day notice deadline. There is no dispute the Company informed the Union in late 2010 about the issues it was facing and its need to bargain for certain economic concessions. The parties spoke and met several times between December 2010 and December 2011 to discuss the Company's need for concessions. At their meetings on October 25 and December 21, the Company gave the Union written comprehensive proposals for a "new agreement," and the parties went through and discussed those proposals at length. Following their October 25 meeting, the parties also exchanged information related to the Company's proposals regarding pension and health insurance. At their final meeting, the Union provided the Company with three ways to make its contract proposal more acceptable to the Union members. At the end of that meeting, the parties agreed to meet on two dates in early January 2012 for further discussions, and the Union stated it would have its entire bargaining committee present for those meetings.

In addition to correctly concluding that the Company provided the Union with requisite notice of its intent to terminate or modify the agreement, the ALJ also properly rejected the Union's belated affirmative defense that the issue should be deferred to the parties' grievance/arbitration procedure. Under the parties' agreement, the Company does not have the ability to initiate a grievance. And even if it did, any grievance now would be untimely. Therefore, under Board law, the matter cannot be deferred.

II. BACKGROUND

A. Parties

The Company is engaged in the manufacture and sale of display signs and lighting products, with six production facilities, including one in South Milwaukee, Wisconsin. (G.C. Exh. 1(c) and 1(f)). Richard Sherman is the Company's Interim President. Barbara Schaal is the Company's Vice President of Administration. Robert Sherwood is the former Director of Employment, Labor and Compensation, and is now a part-time employee working in Human Resources. Randall Krocka is the Union's Financial Secretary – Treasurer, and Earl Phillips is the Union's Business Representative. (G.C. Exh 1(c) and 1(f)).

B. Collective Bargaining Relationship

The Union is the recognized Section 9(a) collective-bargaining representative for a unit of "...all Sheet Metal production employees of the Company excluding only supervisors, office clerical help, watchmen and guards as defined in the National Labor Relations Act of 1947, as amended..." The unit is appropriate within the meaning of Section 9(b) of the Act. (G.C. Exh 1(c) and 1(f)). The parties' most recent collective-bargaining agreement is dated March 1, 2009 to February 29, 2012. (G.C. Exh. 2).

C. Procedural History

On March 2, 2012, the Company filed an unfair labor practice charge against the Union alleging that it violated Section 8(b)(3) of the Act by failing and refusing to bargain with the Company over a successor agreement. (G.C. Exh. 1(a)). On April 27, 2012, the Regional Director issued a Complaint and Notice of Hearing. (G.C. Exh. 1(c)). On May 10, 2012, the Union filed its Answer to the Complaint. (G.C. Exh. 1(e)). On June 11, 2012, the Union filed a

First Amended Answer to the Complaint. (G.C. Exh. 1(f)). The hearing occurred before the ALJ on June 18-19, 2012.

III. FACTUAL ANALYSIS

The Company currently has manufacturing plants in South Milwaukee, Wisconsin; Elkhorn, Wisconsin; Pardeeville, Wisconsin; Chanute, Kansas; Mt. Vernon, Illinois; and Buena Vista, Virginia.[3] (Tr. 27-28). The present dispute involves the South Milwaukee plant. There are approximately 80 production employees at the South Milwaukee plant. The Union represents approximately 30 of them, and the rest are represented by the United Electrical, Radio and Machine Workers ("UE"). (Tr. 29-30).

In recent years, the Company has received increased pressure from its customers to reduce costs in order to remain competitive in an increasingly global economy. (Tr. 34-35). In mid-2010, the Company hired Rick Sherman to be a member of its advisory board to help improve the Company's overall performance. Sherman thereafter began working with the Company's Vice President of Administration, Barbara Schaal, toward reducing the Company's overall labor costs. (Tr. 35-36). Beginning in late 2010, Sherman and Schaal began contacting the unions representing employees at the Company's various plants to bargain over wage and benefit concessions.

Sherman initially contacted the Union in late 2010 to for this purpose. (Tr. 36-37). Sherman spoke to and met with the Union's business representative, Earl Phillips, and the Union's financial secretary/treasurer, Randy Krocka. Sherman identified the issues the Company was facing and stated that in order to keep jobs from going overseas, the Company wanted to reopen the parties' contract and bargain for certain concessions that would allow the Company to reduce its costs. Phillips and Krocka stated the Union was not willing to reopen the

contract at that time. Krocka added that if the Union were to agree to anything, the Company would first need to get rid of Keith Saylor, the General Manager of the South Milwaukee plant. (Tr. 39-40).

After meeting with the Union, Sherman continued meeting with the other unions representing employees at the Company's plants, including unions representing employees at the Company's Mt. Vernon plant, Pardeeville plant, and La Crosse plant. Sherman also met with the UE regarding the other unit of approximately 50 employees working at the Company's South Milwaukee plant. The Company began negotiations with the UE in around October 2011, and those negotiations concluded in early 2011 with a successor agreement. (Tr. 38-39). Sherman was successful in getting some of the unions, including the UE, to agree to certain concessions. (ER Exhs. 2-5).

In July, the Company reached out to the Union about meeting again. Part of the impetus for this was that Keith Saylor, the General Manager at the South Milwaukee plant, was no longer employed by the Company. (Tr. 40-42). The Company sent emails to the Union to schedule meeting dates. (G.C. Exhs. 3 and 4). The parties eventually agreed on August 29. Part of the meeting was to address a grievance and part was to meet with Sherman. (G.C. Exhs 4 and 5). Sherman is not involved in handling grievances, so he was not present for the first part of the meeting. That portion of the meeting was handled by Schaal and Neal Fuchs (the Company's Environmental and Safety Manager). Phillips and a steward, Jim Fox, were present for the Union. (Tr. 41-42). For some unknown reason Krocka did not attend the meeting, even though he was notified of the meeting and had been involved in the earlier meetings.

The grievance involved Mark Rumpel, an employee with a workers' compensation issue. (Tr. 43-44). The parties discussed and resolved Mr. Rumpel's grievance in about 10 minutes.

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[3] The Company had a facility in La Crosse, Wisconsin, which closed in early 2011. (Tr. 29:19-24)

After that, Fuchs left, and Sherman came into the room. Fuchs did not stay because he is not involved in bargaining. Everyone else remained.

Sherman began the second part of the meeting by discussing the state of the Company's business, including the increasing global competition the Company was facing, and its need to reduce its costs to remain competitive against foreign competition. (Tr. 43-44). Sherman reminded Phillips of their prior conversation regarding Keith Saylor, and how the Union would not bargain as long as Saylor remained an employee of the Company. He stated "As you are aware, Mr. Saylor is no longer here. We'd like to discuss the concessions that we're looking for." (Tr. 43:21-23). Sherman and Schaal also informed Phillips about the deals the Company reached with some of the other unions, including the UE.[4] (Tr. 43-44). Fox acknowledged he was aware of the Company's new agreement with the UE. Sherman noted that the owner of the Company, Judy Wamser, is very passionate about keeping jobs in the United States, but again that the Company was facing pressure from its customers to respond to global competition. (Tr. 44-45). Phillips responded that he could not have discussions like this without Krocka being present. [Krocka did not explain why this was the case.] The parties agreed to schedule another meeting. The meeting lasted about an hour.

In the following weeks, the parties exchanged emails about scheduling further meeting dates. (G.C. Exhs. 6 and 7). They finally agreed to meet on October 25 at the Union's offices.

The parties met at 9 am on October 25 at the Union's offices.[5] (Tr. 47-48). Schaal and Sherman were present for the Company, and Krocka and Phillips were present for the Union.

[4] As Schaal testified, the negotiations with the UE regarding the South Milwaukee plant were for a successor agreement. (Tr. 44:4-16). The parties reached a new agreement in May 2011. (ER Exh. 4).
[5] Schaal testified that the only times she has been to the Union's offices was when the parties met for contract negotiations, and that she has never been there for any other purpose. (Tr. 47-48).

Sherman began the meeting by once again reiterating the issues facing the Company. (Tr. 48-49). Sherman and Schaal noted the increasing pressure the Company was receiving from one of its primary customers, McDonald's, to outsource certain work performed at the South Milwaukee plant to companies in China. The Company then gave the Union a complete written contract proposal detailing the specific concessions the Company was seeking. (G.C. Exh. 8). The Company's proposal clearly stated that it would be for a "new agreement" effective from December 1, 2011 through February 28, 2017. Schaal and Sherman went through and explained each provision of the proposal. (Tr. 50-51). One of the proposals the Company made was to cease making contributions to the Union's pension fund. Krocka pointed out that the proposed change would trigger withdrawal liability for the Company. There was a discussion about the Union pension fund, and Schaal asked Krocka to provide her with updated information as to how much the liability would be if the Company stopped contributing to the fund. (Tr. 51-52). Krocka said he would get her that information. In response to the Company's proposal, Krocka asked Schaal if the Company was pleading poverty. Schaal replied that that it was not.

Schaal also described the Company's proposal to move the Union employees into the Company's office employees health insurance plan. (Tr. 52-53). Phillips requested information about the plan, and Schaal agreed to provide it to him. The parties also discussed the Company's other proposals. After about two hours, the meeting ended and the parties agreed to meet again in mid-November. (Tr. 53-54) (G.C. Exh. 10).

Krocka later sent Schaal information as to what the liability would be if the Company withdrew from the pension fund (G.C. Exh. 9), and Schaal sent Phillips information comparing the Union employees' current health insurance plan with the Company's office health insurance plan. (G.C. Exh. 11). The parties also agreed to meet again on November 17.

The Union cancelled the scheduled November 17 meeting because of a conflict. (G.C. Exh. 12). The parties later rescheduled the meeting for December 21. (G.C. Exhs. 13 and 14). The parties' agreement expired on February 29, 2012. As previously stated, Article XXXII, Section 2 of the parties' agreement states that the terms of the agreement shall continue in effect on a year to year basis, unless either party notifies the other of its intent to modify, or terminate this Agreement, and does so in writing at least sixty (60) days prior to the expiration date, which meant that notice needed to be given by December 30. (G.C. Exh. 2).

On December 14, the Company completed and submitted its FMCS Form 7 notice electronically. (G.C. Exh. 15). On December 21, the FMCS sent letters to the Company and the Union informing them that a mediator had been assigned to assist in their negotiations. (G.C. Exhs. 18 and 19). The Union stipulated at the hearing that it received this December 21 letter from FMCS on December 27. (G.C. Exh 19).

On December 21, the parties met at 8 am, again at the Union's offices. (Tr. 61-63) (G.C. Exh. 16). Sherman and Schaal were present for the Company, and Krocka and Phillips were present for the Union. The Company again began by explaining the issues facing it, and new developments about its Chinese competitors. (Tr. 62-63). The Company then submitted a revised written contract proposal. The Company was no longer proposing to cease contributing to the fund. (G.C. Exh. 16). This change was in response to the information that the Union provided to the Company regarding what the Company's withdrawal liability would be if it stopped contributing to the fund.

This revised, comprehensive proposal again clearly stated that it would be for a "new agreement" effective from December 1, 2011 through February 28, 2017. It proposed changes to 10 out of the 32 articles of the contract, including changes to all of the financial terms. Sherman

and Schaal again explained the proposal. Krocka and Phillips commented that the Company's workers were some of the lowest paid employees in the Union, and that the employees would never agree to the proposed cuts. Sherman again restated the issues facing the Company, and the need for changes in order to keep the jobs at the South Milwaukee plant. Krocka also said that the Union was not bargaining. (Tr. 62-63).

The Company, however, was not deterred. Sherman and Schaal continued to engage Krocka and Phillips, asking the Union how the Employer could get the Union bargaining committee to agree to the Company's proposed cuts, again explaining why the cuts were needed. (Tr. 64-65). Krocka said that one approach would be to have a two tier system in which existing employees would be grandfathered in under the current terms, and the revised terms would apply to new employees. Krocka testified that he referred to Poblocki Paving, which is a company that implemented such a tier system. Another approach the Union suggested was be to show the unit employees the first proposal because the employees would see they did not get the worst deal (i.e., under the second proposal the Company would continue making contributions to the pension fund). Also, during this discussion, the Union expressed concern that even if it agreed to the proposed changes, the Company could still close the South Milwaukee facility as it had done to La Crosse plant. Sherman stated that the Company would be willing to include language in the agreement that if the Company had to close the South Milwaukee facility, it would pay employees severance, like it had agreed to do for the Mt. Vernon, Illinois employees. (Tr. 103-105). [The Union knew about the other negotiations and the concessions sought at Pardeeville, Wisconsin, Mt. Vernon, Illinois, South Milwaukee, Wisconsin, and La Crosse, Wisconsin. (ER. Exh. 2-5). This meeting lasted about two hours. (Tr. 64-65). At the end of the meeting, the parties scheduled another meeting again at the South Milwaukee plant on January 9, 2012 (at

1:00 pm) and at the Union's offices on January 11, 2012 (at 9:00 am). (Tr. 108-109). The Union also agreed to having its bargaining committee attend these January bargaining sessions. Additionally, the parties discussed, and the Union agreed, that the Union would be responsible for paying for those employees to attend.

On December 26, the Union held a meeting with its members at Muskey's Tavern. (Tr. 157-158). Krocka testified that at this meeting, the Union distributed surveys to its members for the upcoming negotiations. (G.C. Exh. 27). The Union held another meeting for its members at the same location on January 6, 2012. (G.C. Exh. 29).

On January 7, 2012, Krocka sent Schaal an email stating that since both sides failed to provide written notice terminating the agreement, the agreement renewed for another year. (G.C. Exh. 18). On January 9, 2012, the Company's attorney, Robert Mulcahy sent the Union a letter again confirming the Company's intent to terminate the parties' 2009-2012 agreement. (G.C. Exh. 3). There is no dispute that Schaal later contacted Krocka and Phillips about the email, and Krocka stated that the Union had found a "loophole" that it was going to use it. Krocka stated he knew by relying on this loophole the Union would take its lumps the next time the parties got together for bargaining. (Tr. 68-69).

IV. ARGUMENT

A. The ALJ correctly concluded that the Company provided the Union with the requisite 60-day written notice of its intent to terminate or modify the parties' 2009-2012 collective bargaining agreement.

Under Article XXXII, Section 2, the Company was obligated to provide the Union with (1) something in writing (2) prior to December 30 (3) that put the Union on notice of the Company's intent to modify or terminate the parties' agreement. For the reasons stated below, the Company satisfied its contractual notice obligations.

The ALJ correctly found that the Company provided the requisite written notice with the contract proposals the Company gave to the Union on October 25 and on December 21, seeking significant changes from the 2009-2012 agreement. (ALJD 4:12-16) (G.C. Exhs. 8 and 16). See *Paper, Allied-Industrial, Chemical and Energy Workers Local 6-0682 (Checker Motors Corp.)*, 339 NLRB 291 (2003) (Although neither party sent notice to terminate or modify agreement, the Board adopted judge's finding that just by sending the union a contract proposal, the company provided sufficient notice that it intended to terminate or modify the agreement to satisfy the contractual notice requirements to trigger the union's obligation to bargain with the company over a successor agreement). There is no dispute that both proposals were in writing, both were given prior to December 30, 2011, and both contained comprehensive terms for a "new agreement" that would be effective until February 28, 2017.

The Union argues the Company's two proposals were inadequate because they did not explicitly state they were intended to "terminate" or "modify" the parties' 2009-2011 agreement. The Board, however, does not require that the notice be technically precise or contain magic words; the Board only requires that the notice convey the essential message that the party intends to terminate or modify the agreement. See *Oakland Press*, 229 NLRB 476, 478-479 (1977). See also *Paper, Allied-Industrial, Chemical and Energy Workers Local 6-0682 (Checker Motors Corp.)*, supra at 299 (Although the company's contract proposal did not explicitly state that it intended to amend or cancel the agreement, the judge held, and the Board adopted, that "absolute perfection is not required to give notice to terminate an agreement.").

In *Oakland Press*, the parties' contractual cancellation/termination provision required that either party provide the other with "notice of desire to cancel or to terminate the [a]greement." The union sent the employer a letter stating that it desired "to continue its collective-bargaining

agreement with your firm" and added only that it also wanted to "negotiate certain changes or revisions in its provisions." The Board adopted the administrative law judge's finding that although the letter did not contain the precise words it conveyed its intent to terminate or modify the parties' agreement. In reaching this conclusion, the judge found that even if the union's letter was inartfully drafted, it was at best a technical defect, and "[a] mere technical deficiency in complying with the termination clause of a contract is not sufficient reason to excuse one's obligation to bargain in good faith." *Id.* at 478. The judge also held that "[a] collective-bargaining agreement is a total document. Changes to one or more of its terms necessarily implies termination of the agreement and emergence of a new one." *Id.* at 479. The Board found the union's letter necessarily implied termination, and, therefore, was sufficient.

In light of the above, the Company's two contract proposals were more than adequate to put the Union on notice that the Company intended to terminate or modify the parties' 2009-2012 agreement. In fact, the Company's proposals provided greater notice than what was provided in *Oakland Press*. In *Oakland Press*, the union only stated its interest in negotiating certain changes or revisions to the parties' agreement. The Company's contract proposals were far more detailed. Each identified the specific contractual provisions the Company wanted to modify, as well as what it wanted those particular modifications to be in the resulting successor agreement. Also, unlike in *Oakland Press*, the Company was not seeking to make a few changes. The Company's proposals sought to modify over *30 percent* (10 out of 32 the articles) of the parties' existing agreement, including *100* percent of the critical financial provisions (e.g., wages, overtime, paid holidays, vacations, health insurance, and pension). These factors,

combined with the other factors described below, put the Union on notice.[6]

In analyzing the sufficiency of a purported notice to terminate or modify an expiring agreement, the Board takes into account not only the language of the notice, but also the surrounding circumstances, including the parties' conduct. See *Paper, Allied-Industrial, Chemical and Energy Workers Local 6-0682 (Checker Motors Corp.)*, supra. See also *Burger Pitts*, 273 NLRB 1001 (1984) (Board found letter alone was insufficient, but letter along with surrounding circumstances constituted sufficient notice). The circumstances in this case make clear what the Company was intending to do by submitting its two comprehensive contract proposals. The process began back in late 2010 when Sherman contacted the Union and informed them as to the issues facing the Company, and the Company's need to reduce labor costs. Sherman is a member of the advisory board, who would not otherwise be meeting with the Union, other than for the purpose of bargaining. The Union stated that it was not interested

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[6] The Union claims the Company's contract proposals were for mid-term modifications, and not for a successor agreement. (U. Brf. pgs. 14-17). This argument should be rejected. As Schaal testified, while the Company initially was seeking mid-term modifications when Sherman met with the Union at the end of 2010, the Company's intentions changed as time progressed and they got closer to the reopener and expiration dates. (Tr. 107-108). At that point the Company's only intent was to negotiate a successor agreement. This is evident from the timing and substance of the Company's two proposals. Both were submitted a few months prior to the agreement's expiration date, and both clearly state they were for a "new agreement" that would be effective until February 28, 2017. And, unlike the Company's November 2010 submission to the Union (U. Exh. 2), the October 25 and December 21 proposals were comprehensive, detailed documents, which clearly referenced each of the specific provisions in the parties' agreement that the Company was seeking to modify or terminate. The Union also argues that both proposals were for mid-term modifications because each proposed an effective date of December 1, as opposed to March 1, 2012. (U. Brf. Pgs. 15-16). This argument also should be rejected. Article XXXII, Section 2 requires that at least sixty (60) days notice be given of a party's intent to terminate or modify the agreement. There is nothing prohibiting a party from providing more than sixty days notice, and that was what the Company did. The Company wanted to begin negotiations, and hopefully reach an agreement, on a successor contract as soon as possible. To that end, when the Company submitted its initial proposal on October 25, it proposed December 1 as the effective date for the "new agreement." That remained unchanged when the Company submitted its December 21 revised contract proposal. As Schaal testified, all of the items in the proposals were negotiable, and, as the documents clearly state, nothing was finalized until it was all finalized. Had the parties continued their negotiations as scheduled, the parties would have bargained over the effective dates for the successor agreement. The Union, however, foreclosed that opportunity by unlawfully refusing to continue bargaining.

in reopening the parties' agreement at that time. Krocka, however, stated during his meeting with Sherman in late 2010 that if the Union were going to engage in bargaining with the Company, the Company first would have to get rid of Keith Saylor, the General Manager of the South Milwaukee plant. In the spring of 2011, Schaal contacted Phillips and Krocka about meeting with Sherman and her. Phillips met with Schaal and Sherman on August 29, and Sherman notified Phillips that Saylor was no longer with the Company, and the Company wanted to meet with the Union to address the issues facing the Company. Sherman informed Phillips that he had obtained concessions in his negotiations with some of the other unions, including the UE, and he was looking to do the same with the Union. Phillips stated that Krocka would need to be involved in any such meeting, so the parties agreed to schedule another meeting when Krocka would be present. The parties later exchanged emails for that purpose. Although these emails do not expressly state that the meetings were for bargaining, the context, particularly Sherman's continued involvement, make clear the purpose of the meetings. That was confirmed when the Company gave the Union its initial contract proposal at their October 25 meeting. In discussing the proposal, particularly the proposal to cease contributing to the Union's pension fund, Krocka pointed out that would trigger withdrawal liability. Schaal asked him to provide her with what that amount would be. Krocka responded by asking if the Company was claiming poverty. Schaal stated the Company was not. [An inference reasonably could be drawn that Krocka asked this question in the hopes that the Company would say it was, and that the Union could request to review the Company's financial records to assist it in bargaining against the concessions the Company was seeking in its proposals.]

Krocka later agreed to provide, and did provide, the Company with the amount of its withdrawal liability. Similarly, when the Company proposed moving the unit employees over to

the Company's office health insurance plan, Phillips asked for a comparison of the two plans. Schaal later provided him with that information in a November email. The parties scheduled further meetings to continue their bargaining discussions. That resulted in the December 21 meeting, where the Company gave the Union its revised contract proposal. At the meeting, Schaal asked the Union how it could present its proposals so that they would be accepted by the members. The Union responded by proposing grandfathering certain employees or showing them the Company's earlier proposal to see that they are getting a better deal (i.e., keeping their pension). In the end, the Union agreed to schedule two further bargaining sessions in January 2012, which would involve the Union's entire bargaining committee. Based on the above, the Union was on notice that the Company intended to terminate or modify the parties' agreement.

The Union also received notice of the Company's intent to terminate or modify the 2009-2011 agreement when it received the letter from FMCS on December 27 that identifies the FMCS mediator assigned to assist the parties in their "upcoming negotiations." (G.C. Exh. 19). See *Champagne County Contractors*, 210 NLRB 467 (1974). In *Champagne County Contractors*, the union historically had sent the employer both an explicit notice of contract termination and also an FMCS Section 8(d) notice form. On one occasion, the union forgot to include the explicit notice of termination and sent only the FMCS form. The FMCS form identified the parties, the number of employees, and the bargaining agreement expiration date. The employer argued that the FMCS form was insufficient notice of termination, particularly because sending only the form differed from past practice. However, the parties also had been discussing upcoming negotiations, i.e., who would be the members of their respective negotiating committees, possible negotiating dates, and whether the union would accept both a limited wage increase and a different contract expiration date. In these circumstances, the Board

adopted the judge's decision finding that the FMCS form was sufficient notice to prevent automatic renewal.

Unlike the situation in *Champagne County Contractors,* the Company did not send the Union a copy of the FMCS Form 7 it filed on December 14. However, according to Bob Sherwood's testimony and the relevant documentation, that is entirely consistent with the parties' past practice. (Tr. 125-135) (ER. Exhs 6-15). The practice, since at least 1990, was that the Union would send a letter seeking to terminate or modify the parties' agreement, and the Company then would complete and submit the Form 7 to the FMCS. The Company never sent the Union a copy of the FMCS Form 7. Instead, for the purposes of Section 8(d), the Company relied upon the fact that its filing of the FMCS Form 7 resulted in the FMCS sending its letter to both parties identifying the mediator assigned to assist in negotiations. At that point, everyone would know that Section 8(d) notice had been given.

The only difference in this case from prior negotiations is that neither party sent a letter explicitly stating its intent to terminate or modify the parties' agreement. Otherwise, everything happened the same way it has for the past 22 years. The Company completed and submitted the on-line FMCS Form 7 on December 14, and thereafter, the FMCS sent its standard letter on December 21 identifying the mediator assigned to assist the parties in their "upcoming negotiations." Both parties received this FMCS letter on or before December 27. At that point, everyone knew that Section 8(d) notice had been given regarding the Company's intent to commence negotiations over a successor agreement.

Based on the totality of circumstances, the ALJ correctly found that the Union had the requisite written notice of the Company's intent to terminate or modify the agreement before December 30.

B. Even if the Company failed to provide the Union with the requisite notice of its intent to terminate or modify the agreement, the Union waived its right to such notice by its conduct in this case.

The Board has found that, by entering into negotiations for a new agreement, parties waive contractual requirements of timely or written notice of termination or modification, and the existing contract does not automatically renew. See *Paper, Allied-Industrial, Chemical and Energy Workers Local 6-0682 (Checker Motors Corp.)*, supra; *Big Sky Locators, Inc.*, 344 NLRB 257 (2005); *Drew Div. of Ashland Chemical Co.*, 336 NLRB 447, 481 (2001); *Lou's Produce*, 308 NLRB 1194, 1200 fn. 4 (1992); and *Ship Shape Maintenance Co., Inc.*, 187 NLRB 289, 290-291 (1970). As stated above, the Union spoke and met with the Company regarding the Company's desire to bargain over changes to the parties' 2009-2012 contract. Those discussions led to the parties meeting on October 25 and December 21. At those meetings, the Company presented its comprehensive proposals for a "new agreement." As previously stated, in late October and early November, the parties exchanged information relating to the Company's initial proposals relating to the pension plan and the health insurance plan, and they scheduled to meet again on November 17. The Union had to cancel the November 17 session because of a scheduling issue, and the parties rescheduled the meeting for December 21. At the December 21 meeting, the Company gave the Union its revised proposal and asked the Union for its proposals as to how to make the proposal acceptable to the Union's bargaining committee and members as a whole. Although the Union never submitted any written counter-proposals, it did orally propose grandfathering of certain employees under the terms of the current contract and having the new terms apply to new employees. The Union also suggested the Company first show the bargaining committee its earlier proposal to make them aware that the concessions could have been worse, and that the employees were now getting a better deal. At the end of the

meeting, both parties agreed to further bargaining, and they agreed to meet on January 9, 2012 at 1 pm at the Company's South Milwaukee plant, and again on January 11, 2012 at 9 am at the Union's offices. The Union stated that the full bargaining committee would be present for those meetings. The parties discussed if the members of the bargaining committee would be paid for their time, and the Union stated that it would pay the employees. Six days after this December 21, 2011 meeting, the Union held a meeting at Muskey's Tavern where it circulated a survey for the members to identify their issues and preferences for a successor agreement. (G.C. Exh. 27). The Union had another meeting with its members at the same location on January 6, 2012. All of the above would lead a reasonable person to conclude that the Union was engaged in bargaining, and, therefore, no further notice was required.

The Union points to the earlier statements by the Union officials declining to reopen the contract, or later statements that the Union was not bargaining. There is no dispute these statements were made. However, this is a situation in which the Union's actions speak louder than its words. The Union's conduct--particularly at the final two meetings--reflects it was, in fact, bargaining and laying the groundwork for further bargaining, and, more importantly, establishes that the Union knew that the Company wanted to terminate or modify the parties' 2009-2012 agreement.

The Union claims that it was merely meeting with the Company and listening to its concerns, and that it regularly agrees to meet and listen to employers about their concerns. If the Union was simply listening to the Company's concerns, then why did it agree to meet with the Company again after their October 25 meeting, where the Company gave the Union its detailed proposal for a "new agreement" aimed at addressing the current and future issues facing the Company? If the Union was simply listening, then why at the December 21 session did it give

the Company verbal proposals as to how to make the Company's proposals more acceptable to the members. If the Union was only listening, why did it agree to meet with the Company again on two separate dates in early January 2012, with the rest of its bargaining committee?[7] The only plausible explanation is that the Union was bargaining or preparing to bargain. However, the Union realized that it was not going to be able to avoid concessions, and, in turn, attempted to rely upon an asserted contractual "loophole" to sidestep further bargaining. By that time, however, it was too late.[8]

At the hearing, the Union claimed it was not bargaining because it never submitted a written counter-proposal. There is no Board decision requiring that a party submit written counter-proposals before it will be found to have waived its right to a termination notice. In *Lou's Produce*, supra, the Board found waiver when the counter-proposals were verbal. See 308 NLRB at 1200 (1992) ("But we told —we talked about this—not with him, but with Frank Coppa months before now, you know, I mean, it was all verbal, though, and I didn't, you know, give it to them in writing."). In *Drew Div. of Ashland Chemical Co.*, supra, and *Big Sky Locators, Inc.*, supra, the Board found waiver based upon the parties' bargaining, but there was

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[7] Krocka lost all credibility with his explanation as to why the Union agreed to meet with the Company for bargaining in January 2012. He stated the reason the Union agreed to meet again on January 9 and January 11, 2012 was that it wanted to have dates set for bargaining in the event the Company gave proper notice of its intent to terminate or modify the agreement on or before December 30, 2011. In other words, the Union met with the Company, received two complete written proposals for a new agreement, discussed those proposals, and offered ways that the proposals could be made to be more acceptable to the members, but it had not received the requisite notice of the Company's intent to modify or terminate the agreement.

[8] The Union argues that it would be contrary to public policy for the Board to hold that a union waives its right to notice by agreeing to sit and listen to an employer talk about its concerns. As already stated, that is not what occurred here. The Company clearly stated that it wanted to negotiate with the Union over changes, and the Union agreed to meet with the Company as that being the Company's stated purpose. The Act is intended to foster collective bargaining. It would be contrary to that policy to allow a party to mislead another party by meeting, discussing proposals, offering oral counter-proposals, agreeing to future bargaining dates, and agreeing to have the entire bargaining committee present for those meetings only to later pull out and say it was not bargaining or aware that the Company wanted to terminate or modify the agreement.

no mention as to whether the party who waived its right to notice ever submitted a written proposal. While there certainly are cases in which the party submitted written counter-proposals, it was never deemed to be dispositive in deciding waiver. And, it certainly is not in this case.

C. The ALJ correctly concluded the dispute over whether the Company provided the Union with requisite notice of its intent to terminate or modify the parties' 2009-2012 agreement was not appropriate for deferral to the parties' grievance/arbitration procedure.

A week before the hearing, the Union raised for the first time an affirmative defense that the matter should be deferred to arbitration. The ALJ properly rejected this defense. (ALJD 4: 36-46). The Union contends that the ALJ erred. (U Brf. Pgs. 8-13). In support for its claim, the Union primarily cites to *Tri-Pak Machinery, Inc.*, 325 NLRB 671 (1998).[9]

In *Tri-Pak Machinery*, the employer and the union were parties to a collective-bargaining agreement which contained the following provision:

> Either party desiring to change or terminate this Agreement must notify the other in writing, by certified mail, sixty (60) days prior to the termination date or on such anniversary termination date thereafter in any subsequent year. When notice is given for changes, the nature of the changes desired must be specified in the notice and the parties shall commence negotiations within such sixty (60) day period and this agreement shall continue in effect after said termination date until agreement is reached or until written notice is given by either party to terminate the Agreement.

Id. at 671.

The parties' agreement was set to expire on February 16, 1996. On December 12, 1995, the Union sent the employer a letter requesting that the agreement be reopened to negotiate seven

[9] This charge was filed March 2, 2012. At no time prior to its June 11, 2012 Amended Answer did the Union advance any claim this matter was amenable to resolution by arbitration. The Union claims that the delay is immaterial. The delay is material for all the reasons the ALJ stated. Additionally, it is entirely consistent with the Union's position throughout, which is to postpone for as long as possible the resumption of bargaining over a successor agreement for which the Company has clearly stated it will be seeking concessions.

provisions of the agreement. Six days later, the employer responded with a letter stating the union's December 12 letter did "not set out the nature of the terms of the changes desired in a specific manner." The union later sent a follow-up letter on January 3, 1996 with the specific revisions it was seeking, but the letter was untimely because it was less than 60 days before the agreement's expiration date.

The issue was whether the union's December 12 letter satisfied the above contractual notice requirement by sufficiently specifying the "nature of the changes desired." The employer claimed that resolution of this issue was appropriate for deferral. The union and the General Counsel claimed it was not. The Board reviewed the factors set forth in *Collyer Insulated Wire*, 192 NRLB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), and concluded that all of the factors were met and that deferral was appropriate. In so doing, the Board held: "If there is no dispute about the existence of the contract containing the arbitration clause, and the clause, as here, broadly covers all disputes about contractual terms, then disputes concerning the renewal or termination of that contract are appropriate for arbitration." See *Tri-Pak Machinery*, 325 NLRB at 673.

The present case is clearly distinguishable from *Tri-Pak Machinery*. First, in *Tri-Pak*, the parties' contract required the party seeking to terminate or change the contract to not only provide the other party with written notice of such intent at least sixty (60) days prior to the expiration, but also required that the notice specify the nature of the changes desired. In that case, the issue was not whether timely notice was given, but rather whether it was sufficiently specific as to the nature of the changes desired. This required interpretation as to whether the union's December 12 letter was sufficiently specific. There is no such requirement in the present

case, and, therefore, there is no basis to defer the matter to an arbitrator to interpret any provisions of the parties' agreement.

Second, in *Tri-Pak*, the union had the ability to initiate the grievance/arbitration procedure by filing a grievance. The Company does not have that ability under the parties' 2009-2012 agreement. Article X of the agreement sets forth the parties' grievance procedure, and it states that it applies to a "dispute, difference, or grievance arising between the Company and any employee covered by the Agreement." Under Article X, Section 2, the only person who can initiate the grievance procedure is "an aggrieved employee." [10]

The Union's argument focuses on the arbitration provision (Article XI), which states that:

> If the grievance has not been satisfactorily settled by the Joint Board or otherwise resolved by the parties; either party may submit the dispute to arbitration within thirty (30) days after the meeting of the Joint Board after giving prior notification of five (5) days to the other party of intention to arbitrate.

(G.C. Exh. 2, page 8).

The Union claims that since either party can submit a dispute to arbitration, deferral is appropriate.[11] The Union, however, ignores the fact that the precursor to submitting a dispute to arbitration is that an actual grievance must be initiated, and, as already stated, the only person or entity that can initiate a grievance under the terms of the agreement is an aggrieved employee.

Moreover, under Article X, Section 2(a), any grievance must be initiated "at least two (2) working days from the time the grievance is alleged to have occurred, except that grievances arising from discharge cases must be presented within five (5) working days." (G.C. Exh. 2, page 8). The first time the Union proposed the grievance/arbitration procedure to resolve this

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[10] Schaal testified she is not aware of the Company ever filing a grievance, and she does not believe that the Company has the ability to do so. The Union offered nothing to refute her testimony.

[11] The Union never attempted to initiate a grievance regarding this issue. The Union claims the Company should have done so. However, the evidence establishes that the Company cannot initiate a grievance under the parties' collective-bargaining agreement.

dispute was June 13, 2012, which is almost six months after the fact. (G.C. Exh. 28). As such, a grievance now would be untimely, regardless of who initiated it.

And, finally, all of this presumes that the parties' 2009-2012 agreement did not expire, and/or that the contractual grievance/arbitration procedure remains in effect.

The Board's decision in *Paper, Allied-Industrial, Chemical and Energy Workers Local 6-0682 (Checker Motors Corp.)*, supra, is directly applicable to this case. In that case, the issue was whether the employer notified the union that it wanted to terminate or modify the parties' agreement in accordance with the contractual notice requirements. At around the time of the unfair labor practice hearing, the union, citing to *Tri-Pak Machinery,* claimed that the matter should be deferred to the parties' grievance/arbitration procedure. Judge Cates rejected the union's claim, holding:

> In agreement with the Government and Company, I find deferral is inappropriate in this case because the parties' collective-bargaining agreement does not provide the charging party (Company herein) with access to the grievance/arbitration procedure. The Board in *Communications Workers (C & P Telephone)*, 280 NLRB 78 fn. 3 (1986), adopted the judge's denial of a motion for deferral to arbitration in an 8(b)(3) refusal to bargain case by holding:
>
> > In adopting the judge's denial of the Respondent's motion for deferral to arbitration, we solely rely on the fact that the parties' collective-bargaining agreement does not provide for the Charging Parties with access to the grievance/arbitration procedure and that to allow Respondent to waive this procedural defect would fundamentally alter the existing dispute resolution procedure.
>
> I am persuaded the Board's holding in *Communications Workers* is controlling herein and I conclude deferral is inappropriate.
>
> I reject the Union's contention the Board's decision in *Tri-Pak Machinery, Inc.,* 325 NLRB 671 (1998), compels a different conclusion namely a finding of deferral in the instant case. In *Tri-Pak*, the Board found no merit to the Government's broad assertion: "that deferral to arbitration is inappropriate for questions regarding extensions or renewals of collective-bargaining agreements as to which the parties are in dispute." However, the Board went on to add, "[I]f there is no dispute about the existence of the contract containing the arbitration

> clause." At the time in July that the Union filed the grievance which it now seeks to have form the basis for deferral to arbitration there existed a real dispute as to whether the contract continued to exist. The Union's conversion to the arbitration route comes too late to be successful because it comes at a time when the Company is unwilling to go to arbitration because of a dispute over whether the contract continues to exist.

PACE Local 6-0682 (Checker Motors Corp.), 339 NLRB at 298.

The Board later adopted the core of Judge Cates' holding, stating the following:

> In *Tri-Pak*, unlike here, the charging party union had a right to invoke the parties' broad arbitration procedure, thereby ensuring that a mutually agreed-upon dispute resolution procedure existed to arbitrate the contract dispute. By contrast, as the judge noted, deferral here was inappropriate because the Charging Party, Checker Motors, had no ability to invoke the grievance procedure to resolve the contract dispute.

Id. at 291 n. 2 (internal citations omitted).

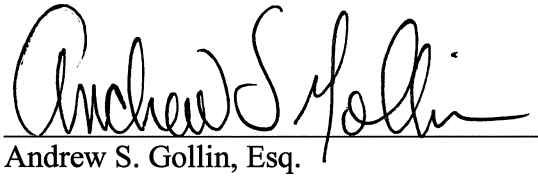
The same conclusion applies in this case. The Company does not have the right to invoke the parties' grievance/arbitration procedure to resolve the contract dispute (assuming there was a contract dispute). And, even if the Company did, a grievance now over the matter would be untimely. As a result, deferral is not appropriate.

V. CONCLUSION

Based on the foregoing, the ALJ's Decision should be adopted. The Company provided the Union with the requisite notice to modify or terminate the agreement to trigger the Union's obligation to bargain with the Company over a successor agreement. And, even if that were not the case, the Union waived it right to such notice by its overall conduct, including, but not limited to, repeatedly meeting with the Company to discuss its comprehensive contract proposals, providing and requesting information relating to the Company's proposals, orally countering with ways the Company could make its proposals more acceptable to the members, scheduling future bargaining sessions with its entire bargaining committee, and meeting with

members to distribute surveys to use in bargaining. As for the Union's belated affirmative defense, the ALJ correctly held that deferral was not appropriate.

Respectfully submitted this 31th day of August, 2012.



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August 31, 2012

Copies of Acting General Counsel's Answering Brief to the Union's Exceptions have been e-filed on August 31, 2012, and copies have been sent via electronic mail and/or regular mail, to the following parties of record:

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